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## Reviving a Double Standard in Statutes of Limitations and Repose: *Rowan County Board of Education v. United States Gypsum Company*

In thirteenth-century England, there were two sets of laws—one applied to the subjects, and the other to the king.<sup>1</sup> The king enjoyed certain privileges because of his position as head of the state. For example, the king was exempt from taxes, and his personal property was not subject to the laws governing those of other Englishmen.<sup>2</sup> While he was not bound by any act of Parliament unless the law expressly included him,<sup>3</sup> he could nevertheless use all the laws to his advantage and could do so without regard to the statute of limitations.<sup>4</sup> “*Vigilantibus sed non dormientibus jura subveniunt*”<sup>5</sup> is a rule for the subject, but *nullum tempus occurrit regi*<sup>6</sup> is the King’s plea.”<sup>7</sup> Thus, the king’s suit never failed for delay.

Today, in the United States, we have no king who can make rules for others and grant privileges to himself. Instead, we have an organized democracy in which the people, through their representatives, make the laws that all must follow. Although the State may have certain rights that a private person does not, the State acquires those rights because the citizens approve them and enjoy benefits from their exercise. Consequently, the State cannot grant itself rights or exemptions from obligations without approval from those whom it governs.

The North Carolina Supreme Court’s decision in *Rowan County Board of Education v. United States Gypsum Co.*<sup>8</sup> threatens to revive the medieval distinction between the governed and the government. Rather than applying a uniform set of laws to private persons as well as the State, the supreme court interpreted a seemingly universal statute of limi-

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1. See generally 1 WILLIAM BLACKSTONE, COMMENTARIES \*237-337 (discussing the king’s prerogative in law); 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340-425 (1936) (discussing the king’s power in English law).

2. HOLDSWORTH, *supra* note 1, at 354.

[T]he king is not liable to pay taxes, toll, pontage, passage, custom, or poor rates; nor is his personal property subject to the laws relative to wreck, estrays, waif, sale in market overt, distress damage feasant and the like. It is indeed generally laid down that “no custom which goes to the person, or goods, of the king shall bind him.”

*Id.* (quoting JOSEPH CHITTY, PREROGATIVES OF THE CROWN 376-77 (1855)).

3. *Id.*

4. *Id.* at 354-55.

5. “The laws aid those who are vigilant, not those who sleep upon their rights.” BLACK’S LAW DICTIONARY 1407 (5th ed. 1979).

6. “Time does not run against the king.” *Id.* at 963.

7. *Armstrong v. Dalton*, 15 N.C. (4 Dev.) 568, 569 (1834) (footnotes added).

8. 332 N.C. 1, 418 S.E.2d 648 (1992).

tations as allowing the State to proceed on a claim that private individuals would be barred from bringing under the same statute.<sup>9</sup> Thus, an injured private party who is slow to bring a lawsuit is denied access to the courthouse, but the State can proceed to trial despite the stale evidence and faded memories incident to delayed claims.

This Note traces the history of the *nullum tempus* doctrine, particularly focusing on how North Carolina courts have applied it to statutes of limitations that cover the government as well as private individuals.<sup>10</sup> Analyzing the court's reasoning in *Rowan*, this Note concentrates on how the court's approach to the statute departs from well-established rules of statutory interpretation and prior case law.<sup>11</sup> Although this Note recognizes the policy considerations that led the court to reach its outcome, it criticizes the decision for setting a standard that can be too easily manipulated and that ultimately may be to the public's detriment, rather than its benefit.<sup>12</sup> Finally, this Note concludes that the rule established in *Rowan* is overinclusive and urges the legislature to enact a strict statutory scheme that will allow only the legislature, not the courts, to decide when *nullum tempus* should apply.<sup>13</sup>

A suit over asbestos removal sparked the statute of limitations and repose controversy in *Rowan*.<sup>14</sup> Between 1950 and 1961, U.S. Gypsum (USG) installed asbestos-containing material in seven schools in Rowan County.<sup>15</sup> The Rowan Board of Education (Rowan) did not know of the

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9. See *id.* at 16, 418 S.E.2d at 658.

10. See *infra* notes 66-121 and accompanying text.

11. See *infra* notes 122-48 and accompanying text.

12. See *infra* notes 149-80 and accompanying text.

13. See *infra* notes 181-87 and accompanying text.

14. *Rowan*, 332 N.C. at 3, 418 S.E.2d at 650. See generally John P. Burns et al., Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 641-59 (1983) (discussing the extent of similar litigation and its effects on the court system).

15. *Rowan*, 332 N.C. at 4, 418 S.E.2d at 651. Rowan alleged that USG had manufactured and installed asbestos-containing acoustical ceiling plasters in its schools. Defendant Appellant's New Brief at 3-4, *Rowan* (No. 339A91). Asbestos is a generic term for several minerals that easily separate into long fibers suitable for use as a noncombustible, nonconducting, or chemically resistant material. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 106 (9th ed. 1986). It has been widely used as insulation in buildings; in fact, nearly one-half of the buildings erected in the United States between 1940 and 1970 contained asbestos. James C. Stanley, Note, *Asbestos in Schools: The Asbestos Hazard Emergency Response Act and School Asbestos in Litigation*, 42 VAND. L. REV. 1685, 1689 (1989). Asbestos in schools is found most frequently in "ceilings, steel-support beams and columns, cafeteria walls, and gymnasium and pool ceilings." James L. Connaughton, Comment, *Recovery for Risk Comes of Age: Asbestos in Schools and the Duty to Abate a Latent Environmental Hazard*, 83 NW. U. L. REV. 512, 514 (1989). Over time, the asbestos materials become "friable," i.e., they crumble and release asbestos fiber into the air. *Id.* Approximately 31,000 schools nationwide have friable asbestos,

health risks associated with asbestos<sup>16</sup> until 1980, when several government publications alerted it to the dangers.<sup>17</sup> After consulting with experts, Rowan decided to allocate tax funds to remove the asbestos in 1983.<sup>18</sup> Two years later, Rowan filed suit against USG alleging negligence, fraud, misrepresentation, and breach of implied warranty<sup>19</sup> in which it sought reimbursement for the costs incurred in removing the asbestos and indemnification for any claims arising out of exposure to the asbestos in the schools.<sup>20</sup> USG moved for summary judgment on the grounds that Rowan's suit was time-barred, since all the applicable statutes of limitations and repose had expired.<sup>21</sup> Opposing the motion, Rowan argued that, as an agent of the State, statutes of limitations and repose were not applicable to it.<sup>22</sup> The trial court granted summary judg-

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and the Department of Education estimates the cost of removal to be as high as \$3 billion. *Id.* at 513 n.5.

16. Hundreds of thousands of people, most of them former asbestos installers, "have died or are dying from asbestos-related diseases." David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up, and Litigation*, 99 HARV. L. REV. 1693, 1693 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS CONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)). Such diseases include asbestosis, a crippling lung disorder; mesothelioma, a rare cancer of the abdominal lining and chest; and "cancer of the lung, esophagus, stomach, colon, and other organs." Connaughton, *supra* note 15, at 514.

17. *Rowan*, 332 N.C. at 4, 418 S.E.2d at 651. The Environmental Protection Agency and the North Carolina Department of Public Instruction published the information. *Id.*

18. *Id.* at 4-5, 418 S.E.2d at 651.

19. *Id.* Rowan alleged that USG learned in 1931 that asbestos dust was harmful to humans and had hired an expert to study and report on asbestos disease problems at its New Jersey plant. Plaintiff-Appellee's New Brief at 10, *Rowan* (No. 339A91). When the health risks became known to it, USG allegedly joined with other asbestos companies to support confidential experiments that revealed the risk of cancer associated with asbestos, but those findings were omitted from the published report. *Id.* at 11. Rowan alleged that USG nonetheless promoted its asbestos products as being "ideal for ceilings in schools." *Id.* at 17. In response to these allegations, USG presented experts who testified that there were no studies of the health effects of asbestos at the time the product was installed in the Rowan County schools, because the scientists did not then have the ability to measure the low levels of airborne asbestos fibers found in buildings. Defendant Appellant's New Brief at 5-6, *Rowan* (No. 339A91). According to USG, the first published study on the airborne level of asbestos did not appear until 1969. *Id.*

20. *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 87 N.C. App. 106, 106, 359 S.E.2d 814, 815 (1987), *disc. rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987) (*Rowan I*). See generally Connaughton, *supra* note 15, at 530-45 (arguing that courts should permit tort recovery for abatement costs in school asbestos cases because of the unreasonable risk of injury).

21. *Rowan I*, 87 N.C. App. at 107, 359 S.E.2d at 815. The statutes of limitations at issue are as follows: ten years for professional malpractice, N.C. GEN. STAT. § 1-15(c) (1983); six years for real property improvements, *id.* § 1-50(5) (1983 & Supp. 1991); six years for products liability, *id.* § 1-50(6) (1983 & Supp. 1991); and three years for any other unspecified injury to the person or rights of another not arising out of a contract. *Id.* § 1-52(5) (1983 & Supp. 1991).

22. *Rowan I*, 87 N.C. App. at 107, 359 S.E.2d at 815.

ment for USG, and Rowan appealed.<sup>23</sup>

In a unanimous opinion written by Judge Robert F. Orr, the North Carolina Court of Appeals reversed the summary judgment against the plaintiff based on the common-law maxim, "*nullum tempus occurrit regi*," or "time does not run against the king."<sup>24</sup> Although section 1-30 of the North Carolina General Statutes provides that "[t]he limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties,"<sup>25</sup> the court recognized that two contrary lines of case law existed on the issue.<sup>26</sup> One line held that the legislature had abolished *nullum tempus* via section 1-30, while the other continued to recognize the doctrine.<sup>27</sup> After reviewing these two lines of cases, the court concluded that *nullum tempus* had not been abolished because the public policy of preserving public rights, revenues, and property still had a "limited place" when a governmental unit was pursuing a sovereign purpose, unless the statute of limitations applicable to the claim expressly included the State.<sup>28</sup> The court found that because Rowan's lawsuit to recover the lost tax dollars qualified as a sovereign purpose, the statute of limitations and repose did not bar the suit.<sup>29</sup> The North Carolina Supreme Court denied USG's petition for discretionary review.<sup>30</sup>

On remand, USG moved at the close of evidence for a directed verdict on all the claims in Rowan's suit.<sup>31</sup> The trial court granted this motion as to the claim of breach of implied warranty, but submitted all other issues to the jury,<sup>32</sup> which awarded Rowan \$812,984.21 in compensatory damages and \$1,000,000 in punitive damages.<sup>33</sup> USG then moved

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23. *Id.*

24. *Id.* at 113, 359 S.E.2d at 818-19.

25. N.C. GEN. STAT. § 1-30 (1983).

26. *Rowan I*, 87 N.C. App. at 109, 359 S.E.2d at 816.

27. *Id.* at 109-12, 359 S.E.2d at 816-18; see also *infra* notes 76-117 and accompanying text (discussing the split in case law).

28. *Rowan I*, 87 N.C. App. at 113-15, 359 S.E.2d at 818-20.

29. *Id.* at 115, 359 S.E.2d at 820. In particular, the court noted that the General Assembly expressly gave school boards the power to bring a lawsuit to recover money or property that should be applied to the support and maintenance of schools. *Id.* at 114, 359 S.E.2d at 819 (citing N.C. GEN. STAT. § 115C-44(a) (1991)).

30. *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 321 N.C. 298, 362 S.E.2d 782 (1987).

31. See *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 103 N.C. App. 288, 292, 407 S.E.2d 860, 862 (1991), *aff'd*, 332 N.C. 1, 418 S.E.2d 648 (1992) (*Rowan II*).

32. See *id.* The jury was left to decide the questions of negligence, fraud, and misrepresentation. It returned a verdict that USG had installed asbestos-containing materials in the Rowan County schools, that USG's negligence had damaged Rowan, and that USG had defrauded Rowan in the transactions relating to these schools. See *id.*

33. See *Rowan*, 332 N.C. at 3, 418 S.E.2d at 650.

for judgment notwithstanding the verdict, which the trial court denied, and another appeal to the North Carolina Court of Appeals followed.<sup>34</sup>

A divided panel affirmed the judgment, with Judge K. Edward Greene concurring in part and dissenting in part on the trial court's denial of a directed verdict on the fraud claim.<sup>35</sup> USG appealed as of right on the issue raised in the dissent, and the North Carolina Supreme Court granted USG's petition for discretionary review on additional issues, including whether statutes of limitations and repose run against the government under these circumstances.<sup>36</sup>

On appeal, the court considered whether section 1-30 of the North Carolina statutes voided the common-law doctrine of *nullum tempus occurrit regi*, thereby barring the government's suit to collect for the cost of asbestos removal after the limitations set forth in the state statutes had expired.<sup>37</sup> Citing numerous cases in support of its position, Rowan argued that section 1-30 did not abrogate *nullum tempus* completely unless the time limitations for a specific cause of action expressly *included* the State.<sup>38</sup> Conversely, USG contended that the legislature meant to abolish *nullum tempus* when it enacted section 1-30 in 1868 and that the State was subject to the time limitations specified for each cause of action unless the pertinent statute expressly *excluded* the State.<sup>39</sup> USG also

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34. See *id.* at 5, 418 S.E.2d at 651.

35. The majority upheld the jury's verdict on fraud, finding that Rowan's evidence established that USG continued to advertise its asbestos products as suitable for use in schools and other public buildings while knowingly concealing the dangers its testing had revealed and that Rowan reasonably relied on these representations. *Rowan II*, 103 N.C. App. at 294-99, 407 S.E.2d at 863-66. Judge Greene, however, characterized Rowan's evidence as circumstantial and concluded that two of the three fraud claims should have been dismissed. Thus, he argued, USG was entitled to a new trial on punitive damages because there was a "substantial likelihood" that part of the punitive damage award was based on claims that should have been dismissed. *Id.* at 309-12, 407 S.E.2d at 871-73 (Greene, J., concurring in part and dissenting in part).

36. 330 N.C. 121, 409 S.E.2d 601 (1991). Another question certified to the court was "whether the Court of Appeals erred in affirming the trial court's decision not to instruct the jury on the issue of the 'state of the art.'" *Rowan*, 332 N.C. at 4, 418 S.E.2d at 651. USG's proposed jury instructions required that the jury consider whether USG had used reasonable care in light of the "prevailing scientific, medical and technological data available when the products were sold between 1950 and 1960." Defendant Appellant's New Brief at 7, *Rowan* (No. 339A91). The trial court refused to give the instructions USG requested, and the court of appeals held that the instruction given presented the issues fairly so that USG was not prejudiced. *Rowan II*, 103 N.C. App. at 308, 407 S.E.2d at 871. The court also found that the admission of post-sale evidence was not erroneous because it was relevant to whether USG suppressed information about the dangers of asbestos. *Id.* at 300-01, 407 S.E.2d at 866.

37. *Rowan*, 332 N.C. at 5-6, 418 S.E.2d at 651-52.

38. *Id.* at 7, 418 S.E.2d at 652; see also *infra* notes 97-117 and accompanying text (discussing case law in support of Rowan's position).

39. *Rowan*, 332 N.C. at 6-7, 418 S.E.2d at 652.

cited numerous cases in support of its position,<sup>40</sup> but it conceded that the courts had made an exception to this rule when the government brought an action to collect taxes that would otherwise be barred by the statute of limitations.<sup>41</sup>

Justice Whichard, writing for the majority,<sup>42</sup> found that tax matters are not narrow exceptions to the abrogation of *nullum tempus*.<sup>43</sup> Rather, *nullum tempus* would apply whenever the State exercises "an attribute of sovereignty,"<sup>44</sup> such as taxation. The court found that the line to be drawn in cases involving the State should be based on the distinction between governmental and proprietary functions.<sup>45</sup> Thus, *nullum tempus* operates to exempt the State and its political subdivisions from time limitations on lawsuits whenever they perform a governmental function unless the statute of limitations expressly includes the State. If the function is proprietary, however, time limitations run against the state and its political subdivisions unless the statute of limitations expressly excludes the state.<sup>46</sup> The court, affirming the court of appeals' reasoning that Rowan was pursuing a governmental function in bringing a lawsuit to recover tax dollars spent on eliminating a health risk, concluded that neither the statutes of limitations nor statutes of repose barred Rowan's suit.<sup>47</sup>

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40. See *infra* notes 76-88 and accompanying text.

41. *Rowan*, 332 N.C. at 7, 418 S.E.2d at 653; see *infra* notes 97-107 and accompanying text.

42. *Rowan* was an 8-1 decision, with Justice Webb dissenting. *Rowan*, 332 N.C. at 3, 418 S.E.2d at 650; see *infra* notes 43-52 and accompanying text.

43. *Rowan*, 332 N.C. at 7, 418 S.E.2d at 653.

44. *Id.* (quoting *Hanover County v. Whiteman*, 190 N.C. 332, 334, 129 S.E. 808, 809 (1925)).

45. *Id.* at 9, 418 S.E.2d at 654. The North Carolina Supreme Court has made the following distinction between governmental and proprietary functions:

"Any activity of the municipality which is discretionary, political, legislative and public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary."

*Rhodes v. City of Asheville*, 230 N.C. 134, 137, 52 S.E.2d 371, 373 (1949) (quoting *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)); see also *infra* notes 149-66 and accompanying text (discussing courts' treatment of proprietary and governmental functions).

46. *Rowan*, 332 N.C. at 9, 418 S.E.2d at 654.

47. *Id.* at 10-14, 418 S.E.2d at 654-57; see also *infra* note 121 (discussing the *Rowan* court's treatment of statutes of repose). In particular, the court noted that education is a governmental function; this characterization is underscored by the inclusion in the state constitution of a separate article entitled "Education" and by the General Assembly's assigning the duty to keep all school buildings in good repair to the local school boards. *Rowan*, 332 N.C. at 10-11, 418 S.E.2d at 655 (citing N.C. CONST. art. IX, § 2; N.C. GEN. STAT. § 115C-524 (1991)). On a separate issue, the court also affirmed the trial court's denial of USG's motion

In further support of its decision, the court noted that fifteen years earlier it had stated that the legislature, not the courts, should decide whether statutes of limitations should run against the State, yet the General Assembly subsequently had not clarified the law.<sup>48</sup> Therefore, the court reasoned, the legislature's inaction could be interpreted only as acquiescence to the court's continued application of *nullum tempus*.<sup>49</sup>

In a dissenting opinion, Justice Webb found the language in section 1-30 clear and unambiguous.<sup>50</sup> Consequently, he argued that the statutes of limitations barred Rowan's action and advocated overruling all cases inconsistent with this rule of law.<sup>51</sup> Criticizing the majority's assertion that the legislature's inaction indicated approval of *nullum tempus*, Justice Webb wrote, "We cannot assume that our legislators spend their time poring over appellate decisions so as not to miss one they might wish to correct."<sup>52</sup>

The questions in *Rowan* of when and against whom statutes of limitations and repose run originated in Roman law at the beginnings of organized government. The first English statutes of limitations established time periods on actions relating to real property, such as barring any suit in which seisin had been acquired before the coronation of Henry II.<sup>53</sup> Not until the Limitation Act of 1623 did the English courts begin to place time restrictions on personal actions.<sup>54</sup> The common law, however, recognized an exception to the statutes of limitations for the king on the theory that he was busy tending to the public good and that he should not "suffer for the negligence of his officers."<sup>55</sup> Thus, time never barred

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for a directed verdict on the fraud claim and refused to consider whether the judge should have given the jury a "state of the art" instruction because discretionary review was allowed impropvidently on that issue. *Id.* at 23, 418 S.E.2d at 662.

48. *Rowan*, 332 N.C. at 8-9, 418 S.E.2d at 653-54 (citing *State v. West*, 293 N.C. 18, 25, 235 S.E.2d 150, 154 (1977)). In *West*, the court recognized that "whether there ought to be a statute of limitations applicable to suits by the State is a matter for the Legislature, not the courts." *West*, 293 N.C. at 25, 235 S.E.2d at 154; see *infra* notes 108-17 and accompanying text.

49. *Rowan*, 332 N.C. at 9, 418 S.E.2d at 654.

50. *Id.* at 23-24, 418 S.E.2d at 662-63 (Webb, J., dissenting).

51. *Id.* at 24, 418 S.E.2d at 662 (Webb, J., dissenting).

52. *Id.* at 24, 418 S.E.2d at 663 (Webb, J., dissenting) (quoting *DiDonato v. Wortman*, 320 N.C. 423, 425, 358 S.E.2d 489, 490 (1987)).

53. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950) [hereinafter *Developments*].

54. *Id.* at 1178.

55. HOLDSWORTH, *supra* note 1, at 355; see also BLACKSTONE, *supra* note 1, at \*237-365 (discussing the extent of a sovereign's power); 1 JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY 316 (reprint 1969) (1787) ("[T]he king, in concurrence with the privilege of instituting his suits without any limitation of time, should, in questions of antiquity, be intitled to throw the *onus*



the king from bringing a lawsuit.

Closely related to a statute of limitations is a statute of repose. Statutes of limitations begin running when a cause of action accrues; statutes of repose are activated when a specific event occurs without regard to whether any injury has been suffered.<sup>56</sup> Most commonly applied in medical malpractice and product liability cases, statutes of repose establish an absolute limit on a plaintiff's right to bring a lawsuit that may expire before the cause of action accrues.<sup>57</sup> Thus, after a specified period of time, the defendant can be secure that he will not be called into court to defend acts committed years ago.<sup>58</sup>

Today, state legislatures determine the time limits applicable to certain kinds of lawsuits, and courts tend to enforce them strictly.<sup>59</sup> The public policies commonly cited in support of statutes of limitations are that they prompt legal actions and punish neglect by compelling the plaintiff to exercise his right to litigate within a reasonable time.<sup>60</sup> Otherwise, the opposing party's defense could be irreparably harmed due to the unavailability or forgetfulness of witnesses.<sup>61</sup>

Statutes of limitations and repose are also practical devices that make the court system more efficient, as timely claims can take precedence over stale ones.<sup>62</sup> In addition, time limitations supplement the

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*probandi* on the defendant; and on his failing, should recover without bringing any proof at all.").

56. See, e.g., *Bolick v. American Barmag Corp.*, 306 N.C. 364, 366, 293 S.E.2d 415, 417-18 (1982).

57. *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985).

58. *Id.* at 634, 325 S.E.2d at 475.

59. See, e.g., *id.* at 634-37, 325 S.E.2d at 476-77; *Bruce v. Bruce*, 79 N.C. App. 579, 583, 339 S.E.2d 855, 858, *disc. rev. denied*, 318 N.C. 281, 347 S.E.2d 36 (1986); see also Kim M. Covello, Note, *Wilson v. Johns-Manville Sales Corp. and Statutes of Limitations in Latent Injury Litigations: An Equitable Expansion of the Discovery Rule*, 32 CATH. U. L. REV. 471, 474 (1983) (noting policies behind statutes of limitations); David M. Ledbetter, Note, *Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations*, 64 N.C. L. REV. 1438, 1443-44 (1986) (stating that statutes of limitations balance the danger of stale evidence, disappearing witnesses, forgotten facts, and efficiency for courts against a plaintiff's right to seek relief); Nancy F. Meloy, Comment, *Statutes of Limitations in Product Liability Actions: The Discovery Rule of Franzen v. Deere & Co.*, 69 IOWA L. REV. 1127, 1127 (1984) (discussing intended effects of statutes of limitations); Carlotta P. Wells, Comment, *Statutes of Limitations in Paternity Proceedings: Barring an "Illegitimate's" Right to Support*, 32 AM. U. L. REV. 567, 574-75 (1983) (discussing policy of statutes of limitations); Note, *Statutes of Limitations and Defendant Class Actions*, 82 MICH. L. REV. 347, 350-51 (1983) (reviewing policy issues behind statutes of limitations).

60. See, e.g., *Black*, 312 N.C. at 634-35, 325 S.E.2d at 475-76 (discussing the discovery statute of limitations in medical malpractice cases).

61. *Id.* at 634, 325 S.E.2d at 475.

62. *Bruce*, 79 N.C. App. at 583, 339 S.E.2d at 858 (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945)).

goals of other laws and procedures, such as making a bona fide purchaser secure in his possession of real or personal property.<sup>63</sup> Underlying both statutes of limitations and statutes of repose<sup>64</sup> is the policy that there comes a time when the defendant should be able to be secure in his obligations.<sup>65</sup>

Early in its history, the North Carolina Supreme Court faced the question of whether time limitations should run against the government. In 1834, the chairman of the Stokes County court sued an executor for his testator's debt more than three years after the last payment was due.<sup>66</sup> Affirming the trial court's instruction to the jury that the three-year statute of limitations did not bar the state's claim, the supreme court in *Armstrong v. Dalton* held that *nullum tempus* applied:

From the presumption that the King is daily employed in the

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63. *Developments, supra* note 53, at 1186. *But cf. infra* notes 108-17 and accompanying text (discussing case in which the court forced a bona fide purchaser to return to the State historical documents that had been missing for 206 years).

64. Similar policies support both types of statutes, although statutes of repose may seem unduly prejudicial to the plaintiff because, in some instances, his right to bring a suit may be cut off before he realizes that he has been harmed. Charles A. Burke, Note, *Repose for Manufacturers: Six Year Statutory Bar to Products Liability Actions Upheld—Tetterton v. Long Mfg. Co.*, 64 N.C. L. REV. 1157, 1160-61 (1986). Statutes of repose, however, have withstood constitutional challenges because public policy favors relieving a potential defendant of his obligations after a finite period of time and preventing claims based on stale evidence. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 53, 332 S.E.2d 67, 72 (1985). For an analysis of the *Tetterton* court's decision, see Burke, *supra*, at 1178, in which the author concludes that statutes of repose may be unconstitutional in limited situations.

65. *Developments, supra* note 53, at 1186. Like most rules, these normally inflexible preconditions of bringing a lawsuit have some exceptions. Based on the feudal concept that the king can do no wrong, sovereign immunity requires the government expressly to give its consent to be sued. See *Corum v. University of N.C.*, 330 N.C. 761, 785, 413 S.E.2d 276, 291-92 (1992); John D. Boutwell, Note, *The Cause of Action for Damages Under North Carolina's Constitution: Corum v. University of North Carolina*, 70 N.C. L. REV. 1899, 1906-11 (1992). The North Carolina Supreme Court first adopted sovereign immunity in *Moffitt v. City of Asheville*, 103 N.C. 237, 255, 9 S.E. 695, 697 (1889). State statutes, however, waive the privilege in some circumstances. See, e.g., N.C. GEN. STAT. § 115C-42 (1987) (providing that a local board of education can waive its governmental immunity by purchasing liability insurance). The state judiciary also has modified the doctrine substantially to allow citizens to sue the government, but it has not been abolished *completely* in North Carolina. For example, in *Corum*, the supreme court allowed a state university professor to bring suit against his administrators for an alleged violation of his free speech rights. *Corum*, 330 N.C. at 785-86, 413 S.E.2d at 291. Writing for the court, Justice Martin recognized that free speech was a constitutional right that must take precedence over the common-law theory of sovereign immunity. *Id.* at 785-86, 413 S.E.2d at 291-92. In addition, the court reaffirmed its position that sovereign immunity would not operate to bar a suit against the state "when public officials invade or threaten to invade the personal or property rights of a citizens in disregard of law." *Id.* at 786, 413 S.E.2d at 292. For a comparison of sovereign immunity with *nullum tempus*, see Thomas A. Bowden, Comment, *Sovereign Immunity from Statutes of Limitation in Maryland*, 46 MD. L. REV. 408, 409-29 (1987).

66. *Armstrong v. Dalton*, 15 N.C. (4 Dev.) 568, 568 (1834).

weighty and public affairs of government, it has been an established rule of common law, that no *laches* shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent. . . . [*N*]ullum tempus occurrit regi is the King's plea. For there is no reason that he should suffer by the negligence of his officers, or by their contracts or combinations with the adverse party. Therefore the King is not bound by any statute of Limitations, unless it is made by express words to extend to him.<sup>67</sup>

This common-law doctrine continued in force even after the state codified the rules of civil procedure. For example, the Code of Civil Procedure in 1854 set time limits for bringing suit on various causes of action, but was silent as to whether these limitations applied to the government.<sup>68</sup>

The legislature amended the Code in 1868,<sup>69</sup> however, with the following provision: "The Limitations prescribed in this chapter shall apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties."<sup>70</sup> Although this provision has been renumbered in various editions of the Code, the same statutory language from 1868 appears in each edition<sup>71</sup> and is now codified in the North Carolina General Statutes as section 1-30.<sup>72</sup>

This statute sparked considerable confusion among the courts as they attempted to discern whether the law was meant to abrogate the long-established doctrine of *nullum tempus*. Because the courts did not have a legislative history<sup>73</sup> on which to rely that stated explicitly whether *nullum tempus* would continue to apply in some circumstances, no clear standard emerged. Consequently, two contrary lines of common law developed—one held that the statute effectively repealed *nullum tempus*,<sup>74</sup> the other held that *nullum tempus* remained applicable in certain situations.<sup>75</sup>

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67. *Id.* at 569.

68. REVISED CODE OF N.C., ch. 65 (Moore-Biggs 1854).

69. *Rowan*, 332 N.C. at 6, 418 S.E.2d at 652.

70. CODE OF CIVIL PROCEDURE OF N.C. § 38 (1868).

71. *See, e.g.*, THE N.C. CODE OF 1943 § 1-30 (1943); N.C. CODE § 120 (1927); THE CODE OF CIVIL PROCEDURE § 21-524 (1881).

72. N.C. GEN. STAT. § 1-30 (1983).

73. Most North Carolina statutes do not have a written legislative history.

74. *See infra* notes 76-96 and accompanying text.

75. *See infra* notes 97-116 and accompanying text. Other state courts also have experienced considerable confusion in determining when and if statutes of limitations run against the government. *Compare* *State Highway Comm'n v. Steele*, 215 Kan. 837, 838, 528 P.2d 1242, 1243 (1974) (holding that statute abolishes *nullum tempus* when public bodies operate in

The first case to bar the State's suit on the basis that the statute repealed *nullum tempus* was *Furman v. Timberlake*,<sup>76</sup> in which the supreme court held that the three-year statute of limitations barred the suit of a former Clerk of Superior Court to recover public funds.<sup>77</sup> Although the plaintiff argued that he should be allowed to proceed under *nullum tempus*, the court declared, "[T]he maxim is no longer in force in this state, having been abrogated by the provisions of The Code, sec. 159."<sup>78</sup> Similarly, the court in *State Hospital v. Fountain*<sup>79</sup> held that section 1-30 barred a state hospital's action to recover money for the care it had rendered from the patient's guardian.<sup>80</sup>

The supreme court recognized that section 1-30 applied to actions involving real property as well. In *Threadgill v. Wadesboro*,<sup>81</sup> a landowner sued the city to recover damages for a trespass on his property.<sup>82</sup> Despite the plaintiff's occupation of the land for the statutory adverse possession period, the city argued that the part of the property on which the city entered was part of a public street and therefore the city "had a right to reassert of control of same for public benefit."<sup>83</sup> Recognizing that the statute made time limitations run against the government as well as private parties, the court stated that *nullum tempus* no longer applied, even in the case of collecting taxes, unless the applicable statute of limitations provided otherwise.<sup>84</sup> Likewise, when a board of education brought

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a proprietary capacity) and *Ohio Dep't. of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140, 527 N.E.2d 798, 801 (1988) ("[A]bsent express statutory provisions to the contrary [the state] is exempt from the operation of a generally worded statute of limitations") and *Commonwealth v. Rockland Constr. Co.*, 498 Pa. 531, 533, 448 A.2d 1047, 1047 (1982) ("[W]e reaffirm the well-established rule that statutes of limitations are not applicable to actions brought by the Commonwealth unless the statute expressly so provides.") and *Commonwealth v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 600, 385 S.E.2d 865, 868 (1989) (holding that *nullum tempus* is limited to statutes of limitations and does not apply to statutes of repose) with *Holloway v. State*, 125 N.J. 386, 398, 593 A.2d 716, 722 (1991) ("[W]e abandoned the common-law doctrine of *nullum tempus*.")) and *Sullivan*, 38 Ohio St. 3d at 141, 527 N.E.2d at 801 (Brown, J., dissenting) ("[S]tatutes of limitation in Ohio are, by the plain language chosen by the legislature, made applicable to the state.").

76. 93 N.C. 66 (1885).

77. The plaintiff alleged that his successor in office had wrongfully taken the funds in 1874, but he did not commence a lawsuit until 1881. *Id.* at 66.

78. *Id.* at 67.

79. 129 N.C. 90, 39 S.E. 734 (1901).

80. *Id.* at 92-93, 39 S.E. at 735. Believing that the patient was indigent, the state hospital had cared for the incompetent woman without compensation for 13 years before it sought to collect from her guardian. The patient's husband had died six years before the suit was brought, and the patient had received \$3,240 from his estate. *Id.* at 91, 39 S.E. at 735.

81. 170 N.C. 641, 87 S.E. 521 (1916).

82. *Id.* at 642, 87 S.E. at 521.

83. *Id.* at 643, 87 S.E. at 522.

84. *Id.* In reaching this conclusion, the court relied on *Furman*, see *supra* notes 76-78 and

suit to recover damages for trees the defendant had cut on its property, the court refused to let the plaintiffs proceed because the statute of limitations had expired.<sup>85</sup> Finding that the legislature had abolished *nullum tempus*, the court declared that "at least in some respects, time does run against the State."<sup>86</sup>

Subsequent rulings continued to adhere to this reasoning, as the courts refused to let any division of state government bring a lawsuit when the applicable statute of limitations had expired.<sup>87</sup> What is now section 1-30 was interpreted as applying all other statutes of limitations to the government, unless the statute creating the cause of action provided otherwise.<sup>88</sup>

In 1943 the North Carolina Supreme Court began scrutinizing statutes of limitations more closely, apparently seeking to resurrect *nullum tempus*. In *City of Raleigh v. Mechanics & Farmers Bank*,<sup>89</sup> the city sued to foreclose street assessment liens dating back to 1926, and the defendant pleaded the ten-year statute of limitations as a bar.<sup>90</sup> The court examined closely the legislative intent behind the ten-year limitation period before concluding that the explicit language of the statute prohibited the application of *nullum tempus*.<sup>91</sup> The court recognized that what is now

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accompanying text, and *City of Wilmington v. Cronly*, 122 N.C. 383, 30 S.E. 9 (1898). This reliance on *Cronly* was misplaced; the *Cronly* court held that statutes of limitations do not run against the state unless the statute expressly names the state. *Cronly*, 122 N.C. at 387-88, 30 S.E. at 10; see *infra* notes 97-101 and accompanying text.

85. *Tillery v. Lumber Co.*, 170 N.C. 296, 298, 90 S.E. 196, 197 (1916).

86. *Id.*

87. See *City of Raleigh v. Mechanics & Farmers Bank*, 223 N.C. 286, 296, 26 S.E.2d 573, 579 (1943) (holding that 10-year statute of limitations bars suit to collect fee for street improvements); *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 269, 20 S.E.2d 97, 103 (1942) (same); *Wilkes County v. Forester*, 204 N.C. 163, 168, 167 S.E. 691, 693 (1933) (holding that the statute of limitations had run against the government's action to foreclose on certificates of tax sales); *Manning v. Atlantic & Yadkin Ry.*, 188 N.C. 648, 665, 125 S.E. 555, 565 (1924) (recognizing that *nullum tempus* applies only in "exceptional cases").

88. See *Kavanaugh*, 221 N.C. at 269, 20 S.E.2d at 103; *Forester*, 204 N.C. at 168, 167 S.E. at 693; *Manning*, 188 N.C. at 666, 125 S.E. at 565.

89. 223 N.C. 286, 26 S.E.2d 573 (1943).

90. *Id.* at 288, 26 S.E.2d at 574.

91. *Id.* at 290-93, 26 S.E.2d at 574-76. Section 56-2717 of the 1929 North Carolina Consolidated Statutes provided:

"No statute of limitation, whether fixed by law especially referred to in this chapter or otherwise, shall bar the right of municipality to enforce any remedy provided by law for the collection of unpaid assessments, whether for paving or other benefits, and whether such assessment is made under this chapter or under other general or specific acts, save from and after ten years from default in the payment thereof, or if payable in installments, ten years from the default of the payments of any installment. . . ."

*Id.* at 289, 26 S.E.2d at 575 (quoting N.C. CONSOLIDATED STAT. § 56-2717 (1929)).

section 1-30 limited the government's right to bring a lawsuit, but that courts had held that the rule applied only when the state is expressly named in the separate statute of limitations for each cause of action.<sup>92</sup> Because the statute authorizing the collections had given the city a remedy to enforce a lien for street improvements and provided an express limitation on that remedy, the court stated that it could not let the city proceed with its suit after that time had expired.<sup>93</sup> The dissenting opinion, however, argued that *nullum tempus* still applied in suits to collect taxes regardless of any express limitation.<sup>94</sup> The dissenters asserted that because taxation was an attribute of sovereignty, only clear and unequivocal language could eliminate that power.<sup>95</sup> Finding the language and the legislative intent in the ten-year statute of limitations to be ambiguous, the dissenting justices concluded that what is now section 1-30 could not operate as an independent statute of limitations against the government.<sup>96</sup>

*Mechanics & Farmers Bank* represents the tension that was beginning to develop in the law concerning *nullum tempus*, but the inconsistencies in the court's decisions had emerged as early as 1898. In *City of Wilmington v. Cronly*,<sup>97</sup> the city brought suit to collect unpaid taxes, some of which had accrued more than ten years before the complaint was filed.<sup>98</sup> The defendant pleaded the statute of limitations as a defense.<sup>99</sup> The court, in a unanimous opinion, summarily rejected the statute of limitations plea: "It needs no citation of authority to show that statutes

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92. *Id.* at 293, 26 S.E.2d at 577.

93. *Id.*

94. *Id.* at 304-06, 26 S.E.2d at 584-85 (Winborne, J., dissenting); see also *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 266, 20 S.E.2d 97, 101 (1942) (holding that city's action to collect street assessments is barred by the statute of limitations because it is not included in the general power to tax). One year after *Mechanics & Farmers Bank*, the court stated that § 1-30 was intended to abrogate *nullum tempus*, but the courts continued to recognize the doctrine in tax cases. *Guilford County v. Hampton*, 224 N.C. 817, 819, 32 S.E.2d 606, 608 (1944).

95. *Mechanics & Farmers Bank*, 223 N.C. at 311, 26 S.E.2d at 587-88 (Winborne, J., dissenting).

96. *Id.* at 315, 26 S.E.2d at 591 (Winborne, J., dissenting). The dissenters disagreed with the majority's conclusion that the statute operated as an independent statute of limitations. Interpreting the statute as being in "derogation of sovereign authority and of common right," *id.* at 296, 26 S.E.2d at 579 (Winborne, J., dissenting), the dissenting justices would have held that no statute of limitations can run against the state. *Id.* at 315, 26 S.E.2d at 591 (Winborne, J., dissenting).

97. 122 N.C. 383, 30 S.E. 9 (1898).

98. *Id.* at 384, 30 S.E. at 11. The plaintiff brought the action on August 28, 1896, to collect taxes on the defendant's property for the years 1875, 1876, 1877, 1881, 1885, 1886, 1891, and 1892. *Id.*

99. *Id.* A local act provided that the town must wait three years before selling land to collect unpaid taxes. The defendant also cited a state law requiring that actions for delinquent property taxes be commenced within 10 years. *Id.*

of limitation never apply to the sovereign unless expressly named therein—*nullum tempus occurrit regi*—and the act . . . authorizing the State, county, and city to recover these delinquent taxes contains no limitation.”<sup>100</sup> The North Carolina Supreme Court, as a result, carved out a judicial exception to what is now section 1-30 by holding that no statute of limitations runs against the state when it brings suit to recover delinquent taxes.<sup>101</sup>

Relying on *Cronly*, the supreme court once again allowed a city to bring suit to collect overdue taxes in *New Hanover County v. Whiteman*.<sup>102</sup> As in *Cronly*, the county had sued to collect taxes that had accumulated as many as nine years before the lawsuit was filed.<sup>103</sup> Citing *Cronly*, the court declared: “Statutes of limitations never apply to the sovereign, unless expressly named therein. *Nullum tempus occurrit regi* is a principle of government which still retains its ancient vigor *in respect to taxes*.”<sup>104</sup> Thus, the statute providing that foreclosure on tax liens must be brought within five years was no bar to the government.<sup>105</sup>

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100. *Id.* at 387-88, 30 S.E. at 10.

101. *Id.* Writing for the court, Justice Walter Clark declared:

The right of taxation is the highest and most essential power of government . . . , and is necessary to its existence. All who are liable to the payment of taxes should pay their legal share. Those who fail to do so simply devolve its payment upon others, for, taxes, being essential to the existence of government, if any do not pay, others have to pay for them.

*Id.* at 385, 30 S.E. at 10 (citations omitted).

102. 190 N.C. 332, 129 S.E. 808 (1925).

103. *Id.* at 332, 129 S.E. at 808. The county sought to collect taxes for the years 1916-19 and 1921-23 from the delinquent taxpayer's heirs. *Id.*

104. *Id.* at 334, 129 S.E. at 809 (emphasis added).

105. *Id.* Section 7990 of the North Carolina Consolidated Statutes provided that no statute shall operate as a bar to foreclose a tax lien. However, § 8037 established a five-year period to collect on tax-sale certificates. *Id.* at 333, 129 S.E. at 809. Considering that time does not run against the sovereign and that the county had elected to proceed under § 7990, the court concluded that the five-year limitation would not bar the county's suit. *Id.* at 334, 129 S.E. at 809. *Contra* *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E.2d 97 (1942). The court in *Kavanaugh* concluded that the city's suit was barred by drawing a distinction between taxes and street assessments. *Id.* at 266, 20 S.E.2d at 101-02. Noting that taxes are levied on all persons and property in a particular area or class to defray the public expenses of that governmental unit, the court found that assessments for local improvements are levied on specific property in proportion to the benefit received for the purpose of offsetting the cost of the improvement. *Id.* at 268, 20 S.E.2d at 102-03. In addition, the government can seize an owner's property for nonpayment of taxes, but not for street assessments. *Id.* Therefore, the court resolved:

The right to levy assessments, in connection with local improvements, is given to municipalities by the General Assembly as a special grant of power, and is not included in their general power to tax. Unquestionably the General Assembly has the right to fix the procedure and prescribe the limitations under which specially granted powers shall be exercised.

*Id.*

Twelve years later, the court relied on *Cronly* and *Whiteman* to reach the same conclusion in *Asheboro v. Morris & Morris*<sup>106</sup> when it allowed the city to foreclose a street and sidewalk assessment lien even though the three-year statute of limitations had expired eight years earlier.<sup>107</sup>

The court extended this exception beyond tax-related matters in *State v. West*,<sup>108</sup> in which it allowed the government to recover public records from a bona fide purchaser.<sup>109</sup> The defendant, a collector of historical documents, had bought two bills of indictment bearing the signature of William Hooper,<sup>110</sup> a signer of the Declaration of Independence, at an auction in New York City in 1974.<sup>111</sup> On February 7, 1975—more than 200 years after the documents had been signed—the state brought a civil lawsuit alleging that it was entitled to recover the indictments because it had the right to possess all public records.<sup>112</sup> The defendant argued that the state had abandoned the records and that he had gained title as a bona fide purchaser.<sup>113</sup> Although the defendant did not raise the statute of limitations issue on appeal, the court commented in dictum that he would have lost if he had chosen to do so.<sup>114</sup> Quoting the dissenting opinion in *Mechanics & Farmers Bank*,<sup>115</sup> the court stated: "Notwithstanding the provisions of G.S. § 1-30, . . . '[i]t has been uniformly held that no statute of limitations runs against the state, unless it is expressly named therein.'"<sup>116</sup> In a dissenting opinion, Justice J. William Copeland characterized the court's decision as allowing a misuse of governmental authority that unfairly deprived the defendant of his possessions.<sup>117</sup>

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106. 212 N.C. 331, 333, 193 S.E. 424, 426 (1937).

107. *Id.* "The plaintiff was not required to institute its action within three years after the maturity of the street assessment installments. [The statute regarding lien foreclosures] relates to individuals and not to the sovereign power." *Id.*

108. 293 N.C. 27, 235 S.E.2d 155 (1977).

109. *Id.* at 32, 235 S.E.2d at 158.

110. At the time the bills were signed in 1767 and 1768, Hooper was the Attorney for the King. *Id.* at 21, 235 S.E.2d at 152.

111. *Id.*

112. *Id.* at 21, 235 S.E.2d at 151.

113. *Id.* at 29-33, 235 S.E.2d at 156-58.

114. *Id.* at 24-25, 235 S.E.2d at 153-54.

115. See *supra* notes 94-96 and accompanying text.

116. *West*, 293 N.C. at 25, 235 S.E.2d at 154 (quoting *City of Raleigh v. Mechanics & Farmers Bank*, 223 N.C. 286, 297, 26 S.E.2d 573, 576 (1943) (Winborne, J., dissenting)).

117. *Id.* at 33, 235 S.E.2d at 158-59 (Copeland, J., dissenting). Although the dissenting justices would have held that the state had not met its burden of proving that it had not abandoned or transferred the documents during the 206-year interval, he criticized the public policy considerations that allowed the government to pursue this kind of claim:

It is well known that most of the discoveries of old papers and records are made by private citizens. To permit the State to ride freely on the backs of private individuals



Although the *Rowan* court recognized the dual development of *nullum tempus*, the majority, like the *West* court, refused to bar the state's action because it found that the time limitations on Rowan's claims did not include the state expressly.<sup>118</sup> Faced with two contrary lines of decisions, the court had to choose one, and it came down on the side of letting the government's lawsuit proceed.<sup>119</sup> The majority, however, qualified that privilege by limiting it to situations in which the government is performing a governmental function.<sup>120</sup> In reaching this result, the court essentially rewrote the law by noting that the statutes creating a cause of action did not expressly include the state in their time limitations. At the same time, it disregarded the language in section 1-30 that expressly extended to the state the time limitations in all other statutes of limitations.<sup>121</sup>

Because section 1-30 of the North Carolina General Statutes dictates when and if the other statutes of limitations run against the state, the court necessarily had to base its decision on an interpretation of that statute. Even though no legislative history existed to guide it in this exercise, the supreme court, following a common judicial practice, relied on well-settled principles from case law to aid in statutory interpretation. When interpreting a statute, the court's task is to determine the legislative intent, which is often derived from the statute's language, and to give the words their ordinary meaning unless the context requires otherwise.<sup>122</sup> In ascertaining the "purpose and spirit" of the statute, the court should presume that the legislature was aware of prior and current case law at the time of the statute's enactment.<sup>123</sup> The court may consider the title of the statute when the words in the text are confusing, but the lan-

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and libraries who have expended their efforts and money to recover and preserve these documents and records, without any reimbursement, does not strike me as fair. The net result of the majority opinion will be to drive documents and records underground and out of the State. I do not consider this good public policy.

*Id.* at 33, 235 S.E.2d at 159 (Copeland, J., dissenting).

118. *Rowan*, 332 N.C. at 8-9, 418 S.E.2d at 653-54.

119. *Id.*

120. *Id.* at 9, 418 S.E.2d at 654.

121. The court also rejected USG's argument that *nullum tempus* applied only to statutes of limitations and not to statutes of repose. "[D]espite the fact that statutes of repose differ in some respects from statutes of limitations, they are still time limitations and therefore still subject to the doctrine that time does not run against the sovereign." *Id.* at 15, 418 S.E.2d at 657-58.

122. *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988) (citing *Housing Auth. v. Farabee*, 284 N.C. 242, 245-46, S.E.2d 12, 14-15 (1973)).

123. *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970); *State v. Biddix*, 76 N.C. App. 30, 34, 331 S.E.2d 717, 720 (1985) (citing *Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473-74 (1985)).

guage in the statute itself controls if the meaning is plain.<sup>124</sup> If the statute affects a common-law rule, the statute is presumed to supersede the common law<sup>125</sup> and shall be construed strictly so that "everything shall be excluded from its operation which does not clearly come within the scope of the language used."<sup>126</sup>

If these principles are applied to the present case, it appears that, contrary to the *Rowan* holding, section 1-30 bars Rowan's suit. Consider the language of section 1-30: "The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties."<sup>127</sup> Regardless of the legislative history, the statute's language is arguably so clear and unambiguous that the court was precluded from looking beyond its face; furthermore, any attempt by the legislature to explain what it meant simply would have repeated the words contained in the statute. Thus, the court needed to look no further than the words of the statute to conclude that the legislature intended for the state to be equivalent to a private party for the purposes of time limitations.<sup>128</sup>

Moreover, where the legislature intended to make an exception to the statute of limitations, it has done so explicitly. Section 1-35 of the North Carolina General Statutes provides a thirty-year statutory period for adverse possession of real property against the state.<sup>129</sup> Section 1-45, however, expressly grants to the state the privilege of bringing an action

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124. *Allen v. Allen*, 76 N.C. App. 504, 505-06, 333 S.E.2d 530, 531 (1985) (citing *In re Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974) and *Toomey v. Lumber Co.*, 171 N.C. 178, 181, 88 S.E. 215, 218 (1916)).

125. *Biddix*, 76 N.C. App. at 34, 331 S.E.2d at 720.

126. *Id.* (quoting *State v. Whitehurst*, 212 N.C. 300, 303, 193 S.E. 657, 659 (1937)); see also *Turlington*, 323 N.C. at 594, 374 S.E.2d at 397 ("[I]n our interpretation of statutes in derogation of the common law . . . we must strictly construe their terms to encompass no more than is expressly provided.") (citing *Candler v. Sluder*, 259 N.C. 62, 65, 130 S.E.2d 1, 4 (1963)).

127. N.C. GEN. STAT. § 1-30 (1983).

128. The majority seems to have read the first "action" in the statute as referring to a kind of behavior rather than an action at law when it drew a line between governmental and proprietary functions. Interpreting the statute in this way, Justice Whichard wrote: "When the State or one of its political arms acts in a governmental fashion, it does not act in the same manner as a private party." *Rowan*, 332 N.C. at 9, 418 S.E.2d at 654. Thus, the court was able to conclude that the statute of limitations did not apply to the state when it was *behaving* as a government unit rather than as a private person.

129. Section 1-35 provides:

The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same [w]hen the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

N.C. GEN. STAT. § 1-35(1) (1983).

to recover possession of a public way regardless of whether the thirty-year period has expired.<sup>130</sup> Although section 1-45 expressly codifies *nullum tempus* in certain adverse possession cases, the *Rowan* court chose to conclude that section 1-30 would not bar all government actions, despite the legislature's failure explicitly to make that exception in each statute of limitations.<sup>131</sup>

Even assuming ambiguity in the statute's language, the circumstances surrounding section 1-30's enactment support the finding of legislative intent to supersede *nullum tempus*. Prior to 1868, the North Carolina Code was silent as to whether time limitations applied to the government, and the common-law principle that "time does not run against the king" had gained wide acceptance.<sup>132</sup> In 1868, however, the legislature stated expressly in what is now section 1-30 of the North Carolina General Statutes that time limitations apply to the state,<sup>133</sup> thereby abrogating *nullum tempus*. While statutes that abrogate the common law should be construed strictly, that "does not mean that such statutes are to be stintingly construed to provide less than what their terms would ordinarily be interpreted as providing."<sup>134</sup> Yet this is exactly what the court did. Contrary to the majority's view in *Rowan*, the statute's language establishes a broad rule that does not purport to make any exceptions based on an analysis of governmental functions versus proprietary functions. Rather, reference to private parties expresses the intent that statutes of limitations are to apply to all plaintiffs, regardless of whether they are individuals or the state.

Not only did the *Rowan* court misapply the principles of statutory interpretation, but it also apparently ignored many of its previous decisions holding that *nullum tempus* should be applied only in tax cases. Cases in which the courts had to interpret what is now section 1-30 consistently held that the statute abrogated the common-law doctrine of *nul-*

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130. Section 1-45 provides:

No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations.

N.C. GEN. STAT. § 1-45 (1983).

131. *Rowan*, 332 N.C. at 8, 418 S.E.2d at 653. *Contra* Plaintiff-Appellee's New Brief at 40, *Rowan* (No. 339A91).

132. See *supra* text accompanying notes 66-68.

133. See *supra* text accompanying notes 69-72.

134. *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988).

*lum tempus*.<sup>135</sup> Even in tax cases, the courts recognized that the legislature intended for section 1-30 to abolish *nullum tempus*; nonetheless, the judiciary created its own exception for taxes. The court allowed the government to pursue delinquent taxpayers after the statute of limitations had expired because "[t]he power to tax is the highest and most essential power of the government, and is an attribute of sovereignty, and absolutely necessary to its existence."<sup>136</sup>

The *Rowan* court used dicta from several cases to contrive the theory that *nullum tempus* does not apply when the state exercises a governmental function.<sup>137</sup> While *Cronly* and its progeny clearly carved out a narrow exception to the abrogation of *nullum tempus* by allowing the state to collect delinquent taxes in the name of public policy, the court has used this precedent to bring about an extension of the law. In *New Hanover County v. Whiteman*,<sup>138</sup> the court declared, "Statutes of limitation never apply to the sovereign, unless expressly named therein. *Nul-lum tempus occurrit regi* is a principle of government which still retains its ancient vigor *in respect to taxes*."<sup>139</sup> However, in non-tax cases the court began to take this statement out of context by quoting the first sentence and ignoring the second sentence, which limited the doctrine's application to tax cases.<sup>140</sup>

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135. See *supra* notes 76-88 and accompanying text. But see *supra* notes 97-107 and accompanying text (discussing cases in which the court allowed the state to proceed with its lawsuit even though the statute of limitations had expired).

136. *New Hanover County v. Whiteman*, 190 N.C. 332, 334, 129 S.E. 808, 809 (1925); see also *supra* text accompanying notes 97-107 (discussing cases making an exception for tax claims).

137. *Rowan*, 332 N.C. at 9, 418 S.E.2d at 654. In *City of Wilmington v. Cronly*, however, the first tax case making an exception to the abrogation of *nullum tempus*, the supreme court began to rewrite what is now § 1-30 when it stated, "It needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein." 122 N.C. 383, 387, 30 S.E. 9, 10 (1898). The *Rowan* court recognized that *Cronly* had been cited in subsequent cases for the proposition that *nullum tempus* does not apply "unless the statute applicable to or controlling the subject provided otherwise," *Threadgill v. Wadesboro*, 170 N.C. 641, 643, 87 S.E. 521, 522 (1916), but it called this citation a "misreading" that had been passed on to other cases in the anti-*nullum tempus* line. *Rowan*, 332 N.C. at 8, 418 S.E.2d at 653. Nevertheless, *Furman v. Timberlake*, 93 N.C. 66 (1885), the first case interpreting what is now § 1-30, stated clearly that the statute repealed *nullum tempus*. *Id.* at 67; see *supra* text accompanying notes 76-80.

138. 190 N.C. 332, 239 S.E. 808 (1925).

139. *Id.* at 334, 239 S.E. at 809 (emphasis added).

140. See, e.g., *State v. West*, 293 N.C. 18, 25, 235 S.E.2d 150, 154 (1977) (making an exception to recover historical public documents); *City of Raleigh v. Mechanics & Farmers Bank*, 223 N.C. 286, 293, 26 S.E.2d 573, 577 (1943) (making an exception to collect street assessments). Arguably, the *Whiteman* court may not have intended for the phrase, "in respect to taxes," to limit the application of *nullum tempus*. Instead, the court may have been referring to taxes as one of several exceptions to the abrogation of *nullum tempus*.

Even in cases holding that section 1-30 barred the state's suit because the statute of limitations had expired, courts tended to include dicta about the attributes of government—dicta that slowly but surely allowed them to resurrect *nullum tempus* when they felt public policy demanded it. For example, in *Guilford County v. Hampton*,<sup>141</sup> the county sought to sell an indigent patient's land to gain reimbursement for thirty-five years of hospital care.<sup>142</sup> Holding that the statute of limitations had expired, the court stated: "While the general law may affect a great many persons, it is not in any sense a contribution levied by the State or county in its sovereign capacity for a public purpose, and is subject to the bar of the three-year statute of limitations."<sup>143</sup> Similarly, in *Mechanics & Farmers Bank*, the court's dictum supported expanding *nullum tempus* beyond tax cases when it declared, "While this ancient maxim has lost much of its vigor by the erosions of time, and by legislative enactment, it is still regarded as the expression of a sound principle of government applicable to actions to enforce the sovereign rights of the State."<sup>144</sup> Indeed, that the court in *State v. West*<sup>145</sup> allowed the state to recover historical documents after 206 years led the *Rowan* court to conclude that the tax cases did not represent an exception to the abrogation of *nullum tempus*;<sup>146</sup> rather, they exemplified the "continuing vitality of the doctrine" in North Carolina.<sup>147</sup> Therefore, the *Rowan* court concluded that time limitations do not run against the state when it is pursuing a governmental interest unless it is named expressly in the statutes prescribing time limitations for each cause of action.<sup>148</sup>

The potential effects of *Rowan* could be far-reaching. Although the *Rowan* court purported to limit the application of *nullum tempus* by the governmental/proprietary distinction borrowed from sovereign immu-

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141. 224 N.C. 817, 32 S.E.2d 606 (1945).

142. *Id.* at 817, 32 S.E.2d at 606.

143. *Id.* at 821, 32 S.E.2d at 609 (emphasis added). Arguing that *nullum tempus* does not protect the state when it brings a civil action for damages, USG relied on *Hampton* to support its position that *nullum tempus* was limited to the powers of "condemnation, conscription, or taxation." Brief for Appellant at 23, *Rowan* (No. 91-339A) (quoting *Hampton*, 224 N.C. at 821, 32 S.E.2d at 608-09).

144. 223 N.C. 286, 293, 26 S.E.2d 573, 578 (1943).

145. 293 N.C. 18, 235 S.E.2d 150 (1977).

146. The *Rowan* court ignored the fact that abandonment, not *nullum tempus* was the issue on appeal in *West*. The *West* court's discussion of *nullum tempus* was merely dicta. See *supra* notes 113-14 and accompanying text.

147. *Rowan*, 332 N.C. at 8, 418 S.E.2d at 653.

148. *Id.* The court apparently was persuaded by *Rowan*'s characterization of cases holding that § 1-30 barred the state's suit as "very old, somewhat confusing, [and] distinguishable on their facts," and by its argument that those cases concerned proprietary functions. Brief for Appellee at 44, *Rowan* (No. 91-339A).

nity,<sup>149</sup> that standard can be manipulated so that statutes of limitations will *never* run against the government. In *Rhodes v. City of Asheville*,<sup>150</sup> a sovereign immunity case, the court explained the difference between governmental and proprietary functions:

"Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary."<sup>151</sup>

Despite these guidelines, there has been considerable confusion among the courts as they try to determine which endeavors are governmental and which are proprietary;<sup>152</sup> to complicate matters further, many functions that governmental units perform have attributes of both.

For example, in *Fawcett v. Town of Mt. Airy*,<sup>153</sup> a town had constructed, operated, and maintained a water and light plant.<sup>154</sup> This was held to be a necessary governmental expense and, therefore, a governmental function.<sup>155</sup> Yet in *Fisher v. City of New Bern*,<sup>156</sup> the court held the same activity to be a proprietary function.<sup>157</sup> The court has recognized that the construction and maintenance of streets by a city is a governmental function,<sup>158</sup> but if the city constructs and maintains a public wharf, it is engaging in a proprietary activity.<sup>159</sup> Likewise, a city that contracts with the county to dispose of its garbage for a fee is exercising a proprietary function;<sup>160</sup> however, if it removes the garbage itself and charges residents a fee that covers its expenses, it is performing a governmental function.<sup>161</sup> Furthermore, the court has ruled that a city that

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149. See, e.g., *Rhodes v. City of Asheville*, 230 N.C. 134, 140, 52 S.E.2d 371, 375 (1949) (holding that legislature did not exempt municipalities that own and operate airports from tort liability).

150. 230 N.C. 134, 52 S.E.2d 371 (1949).

151. *Id.* at 137, 52 S.E.2d at 373 (quoting *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)).

152. See *infra* text accompanying notes 153-66.

153. 134 N.C. 125, 45 S.E. 1029 (1903).

154. *Id.* at 125, 45 S.E. at 1029.

155. *Id.* at 127-30, 45 S.E. at 1030-31.

156. 140 N.C. 506, 53 S.E. 342 (1906).

157. *Id.* at 511, 53 S.E. at 344. But see *Klassette v. Liggett Drug Co.*, 227 N.C. 353, 360, 42 S.E.2d 411, 416 (1947) (holding that when the town provides water to put out fires, such activity is a governmental function).

158. See *Bunch v. City of Edenton*, 90 N.C. 431, 433-34 (1884).

159. *Henderson v. City of Wilmington*, 191 N.C. 269, 279-80, 132 S.E. 25, 30-31 (1926).

160. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 530, 186 S.E.2d 897, 908 (1972).

161. *James v. City of Charlotte*, 183 N.C. 630, 632-33, 112 S.E. 423, 424 (1922).

collects donations covering less than one percent of the cost of operating a playground is acting in a governmental capacity,<sup>162</sup> yet a city that charges a small fee for admission to a public park acts in a proprietary manner.<sup>163</sup> The construction, operation, and maintenance of a public airport also can be either a governmental<sup>164</sup> or proprietary function.<sup>165</sup>

While the courts have refused to articulate plain rules for distinguishing between governmental and proprietary functions, it is clear that activities associated with a monetary charge generally will be deemed proprietary, and activities historically performed by the government, rather than a private corporation, generally will be deemed governmental.<sup>166</sup> Using this framework for analysis, the court of appeals in *Rowan* concluded that the board of education was acting in a governmental capacity by bringing suit to recoup tax dollars spent to preserve and maintain school property.<sup>167</sup> If the courts consider only the source of funds in distinguishing between governmental and proprietary functions, every suit to recover tax dollars could be classified as a governmental function. USG made this argument to the court:

Under this sweeping analysis, virtually any suit brought by any governmental unit to recover money damages would be a "governmental" function because almost every conceivable governmental suit can be linked in some remote fashion to tax revenues. For example, suits by school boards to recover for defective school supplies or for defective playground equipment would, under the reasoning employed by the Court of Appeals, rise to the level of "governmental functions."<sup>168</sup>

The supreme court agreed with the court of appeals and found that *Rowan* was pursuing a governmental function, primarily on the basis of the state's responsibility to operate and maintain the public schools.<sup>169</sup> Noting that funds for operating the schools came from public revenues, it concluded that the school board had a duty to recover its money and

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162. *Rich v. City of Goldsboro*, 282 N.C. 383, 387-88, 192 S.E.2d 824, 826-27 (1972).

163. *Glenn v. City of Raleigh*, 246 N.C. 469, 477, 98 S.E.2d 913, 918-19 (1957).

164. *Turner v. City of Reidsville*, 224 N.C. 42, 46, 29 S.E.2d 211, 214 (1944) (upholding issuance of bonds because city's construction and maintenance of municipal airport is for a public purpose).

165. *Rhodes v. City of Asheville*, 230 N.C. 134, 140, 52 S.E.2d 371, 375 (1949) (operating an airport for a public purpose does not insulate municipality from tort liability).

166. *See Sides v. Cabarrus Memorial Hosp.*, 287 N.C. 14, 22-23, 213 S.E.2d 297, 302-03 (1975).

167. *Rowan I*, 87 N.C. App. 106, 115, 359 S.E.2d 814, 819 (1987).

168. Defendant Appellant's New Brief at 24, *Rowan* (No. 339A91).

169. *Rowan*, 332 N.C. at 11, 418 S.E.2d at 655.

property.<sup>170</sup> Thus, the *Rowan* court cast the often controlling element of public funds into the murky distinction between governmental and proprietary functions—a factor that may lead future courts to find that a governmental function exists whenever public funds are involved. This kind of inclusive rule, combined with the court's exception to the abrogation of *nullum tempus* for governmental functions, could allow the government to litigate innumerable lawsuits that statutes of limitations and repose would have barred.

The *Rowan* court's decision also contains important public policy implications. Undoubtedly, the doctrine of *nullum tempus*, as revived in *Rowan*, has the potential to permit the government to serve the public better by allowing state officials to recover public money, regardless of how long ago the wrong that resulted in its loss was committed. At first glance, this may seem a noble goal, one that will only contribute to the public welfare;<sup>171</sup> upon closer inspection, however, it unquestionably undermines the policies that led the government to establish statutes of limitations and repose in the first place.

Under the law of *Rowan*, the government will have an infinite amount of time in which to bring a civil lawsuit. As a result, documents that would help the defendant prepare his defense may have been lost or destroyed, key witnesses may have died or their memories may have faded, and an already overloaded court docket will have to accommodate stale claims at the expense of more timely ones.<sup>172</sup> Moreover, the government will be able to shake defendants from their secure state of repose<sup>173</sup> and even reclaim property from a bona fide purchaser, as it did in *West*.<sup>174</sup> The legislature enacted statutes of limitations to prevent these very consequences, and, until now, courts have construed them strictly in the interest of public policy.<sup>175</sup> The *Rowan* court never discussed these negative effects and instead rested its holding on the positive public policy of allowing the government to recover public funds.

In addition, the court's decision has the potential to discourage businesses from contracting with the government. The policy underlying the statutes of limitations and repose recognizes that there comes a time

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170. *Id.*

171. To counter this point, USG argued that the protections of *nullum tempus* will only encourage "sloth and inactivity on the part of the State and its subdivisions." Defendant Appellant's New Brief at 19, *Rowan* (No. 339A91).

172. See Ledbetter, *supra* note 59, at 1443-44.

173. See *Developments*, *supra* note 53, at 1186; James M. Fischer, *The Limits of Statutes of Limitation*, 16 SW. U. L. REV. 1, 2 (1986).

174. See *supra* notes 108-17 and accompanying text.

175. See *supra* notes 59-65 and accompanying text.



when the defendant should be able to be secure in his obligations.<sup>176</sup> For this reason, the North Carolina General Assembly has prescribed definite time limitations in which a plaintiff must bring a claim or be forever barred.<sup>177</sup> Thus, if one person believes he has wronged another and worries that he may be sued, he can feel secure after a finite period of time—unless he has wronged the government. Theoretically, anyone who deals with the state by selling it equipment, or as in *Rowan*, by constructing a building, acquires a timeless potential for liability. This liability may benefit the public by discouraging negligence among companies that regularly do business with the state, but for others, especially small businesses, the price may be too high to pay, especially since punitive damages may be awarded on the claim.<sup>178</sup> Unwilling to expose themselves to unending liability and the potential for a large punitive damages award, many companies may choose simply not to do business with the state.<sup>179</sup> Presumably, those electing to take the risk necessarily will impose the added costs on the state by raising the price of their products or services. Thus, the cost of limitless liability eventually must be paid for by the public revenues the *Rowan* court sought to protect.<sup>180</sup>

Given these potentially widespread effects, if the judiciary wants to supplement the legislatively created exceptions to the abrogation of *nullum tempus*<sup>181</sup> so that the government can recover public funds, it should

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176. See *supra* text accompanying notes 56-61. USG asserted that even if the court concluded that *nullum tempus* prevented the statutes of limitations from running against the government, *Rowan's* claim still would be barred by the statutes of repose. Defendant Appellant's New Brief at 25-30, *Rowan* (No. 339A91). Arguing that the intent of repose statutes would be thwarted if a defendant's right of repose were contingent on the character of the plaintiff, USG urged the court not to shield the government from the running of statutes of repose. *Id.* at 29. The court, however, refused to make this distinction and declared that *nullum tempus* precludes statutes of limitations and statutes of repose from running against the state unless the statute expressly includes the state. *Rowan*, 332 N.C. at 14-16, 418 S.E.2d at 657-58.

177. See N.C. GEN. STAT. §§ 1-15 to 1-56 (1983 & Supp. 1991) (setting time limitations on specific causes of action).

178. The *Rowan* court allowed the school board to recover not only the cost of removing the asbestos, but also \$1,000,000 in punitive damages. *Rowan*, 332 N.C. at 3, 418 S.E.2d at 650.

179. For example, the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2641-2654 (1988), 20 U.S.C. §§ 4011, 4014, 4021, 4022 (1988 & Supp. II 1990), requires school buildings to be inspected for asbestos, and officials must take appropriate action to guard against health risks. The Act has dramatically increased the demand for accredited contractors to perform the inspections, but schools have experienced difficulty in finding such personnel because many contractors cannot afford the high cost of liability insurance. Stanley, *supra* note 15, at 1688; cf. W. Bruce Shirk & Bennett D. Greenberg, *An Analysis of the Web of Civil and Criminal Liability for Defective Pricing of Government Contracts*, 33 CATH. U. L. REV. 319, 323-44 (1984) (discussing the potential criminal and civil liability a contractor may face for failing to deal honestly with the government).

180. See *Rowan*, 332 N.C. at 10-14, 418 S.E.2d at 655-57.

181. See *supra* notes 129-30 and accompanying text.

do so narrowly, creating an exception that is clearly defined and does not depend on the shifting line between governmental and proprietary functions. Prior to *West* and *Rowan*, the courts correctly made this kind of exception only where the government brought suit to collect unpaid taxes.<sup>182</sup> This tax collection exception is sound because its underlying premise is that *only* the government can collect taxes. This is a "pure" governmental function, a privilege that a private individual can never exercise. Thus, the language in section 1-30 providing that limitations will apply to the state "in the same manner as to actions by or for the benefit of private parties"<sup>183</sup> would allow an exception for tax cases because a private person could not bring a suit to collect unpaid taxes. Furthermore, an exception limited to pursuing delinquent taxpayers would carry out the legislative intent of statutes of limitations and repose. A defendant other than a delinquent taxpayer could be secure in his obligations after a finite period of time and would not have to worry about being called into court to defend a claim based on stale evidence.<sup>184</sup> Arguably, even an exception for tax cases threatens to undermine the policies of these statutes, but the greater public policy of requiring every citizen who receives the benefits of government to contribute to the cost of those services, combined with the government's unique power to tax, outweighs any harm the defendant may suffer. Indeed, *not* making an exception to the abrogation of *nullum tempus* for tax purposes would invite citizens to find ways to avoid paying their taxes for the statutory time period and, consequently, compel honest taxpayers to forgo valuable services or pay more than their fair share.<sup>185</sup>

Most importantly, an exception only for taxes would eliminate the risk of creating a double standard in the law that has not existed since government was synonymous with kings and castles.<sup>186</sup> An all-powerful monarch does not determine what the law of North Carolina shall be. Instead, we have a democratic government in which the people are the source of all governmental authority. Therefore, the people, through their representatives in the legislature, should decide when statutes of limitations will run against the government.

The language of section 1-30 is unambiguous,<sup>187</sup> and it makes no

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182. See *supra* notes 97-107 and accompanying text.

183. N.C. GEN. STAT. § 1-30 (1983).

184. See *supra* notes 60-65 and accompanying text.

185. See *supra* note 101.

186. See *supra* notes 1-7, 53-55 and accompanying text.

187. *Rowan*, 332 N.C. at 24, 418 S.E.2d at 662 (Webb, J., dissenting). *Contra Rowan*, 332 N.C. at 6-8, 418 S.E.2d at 652-53 (giving no deference to or interpretation of the statute, the majority's analysis strongly intimates that much ambiguity exists).

express exceptions. Nevertheless, under the law of *Rowan*, the General Assembly would need to amend all statutes of limitations and repose, except those applicable to tax collection, so that the time limitations would expressly extend to state actions. Alternatively, the General Assembly should amend section 1-30 to provide that statutes of limitations and repose will run against the State or any person bringing an action on its behalf unless the statute creating the cause of action expressly has excluded the State from its operation. The legislative history accompanying any amendment to section 1-30 should indicate clearly that the General Assembly intends to abolish *nullum tempus* unless otherwise provided. The legislature might then enact a separate statute that would exempt the State and its agents from the statute of limitations when they bring a lawsuit to collect delinquent taxes. With this kind of statutory scheme in place, the courts will be unable to dictate when time limitations run against the government, and the medieval double standard of *nullum tempus occurrit regi* will finally take its proper place in the history books rather than the statute books.

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